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In the Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION AND
WESTERN STATES PETROLEUM ASSOCIATION,

Petitioners,

v.

SOUTH COAST AIR QUALITY MANAGEMENT
DISTRICT, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether local government regulations prohibiting the purchase of new motor vehicles with specified emission characteristics — which are otherwise approved for sale by state and federal regulators — are preempted by Section 209(a) of the Clean Air Act, which expressly preempts any state or local "standard relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a).

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner Engine Manufacturers Association ("EMA"), a not-for-profit trade association, was plaintiff and appellant below. It has no corporate parents, subsidiaries or affiliates, and no publicly traded company has a 10% or greater ownership interest in EMA.

Petitioner Western States Petroleum Association ("WSPA") intervened as a plaintiff and was an appellant in the court of appeals. It is a trade association organized as a non-profit corporation. WSPA has no corporate parents, subsidiaries or affiliates, and no publicly traded company has a 10% or greater ownership interest in WSPA.

Respondents South Coast Air Quality Management District, its individual Board Members (William A. Burke, Norma J. Glover, Michael D. Antonovich, Hal Bernson, Jane W. Carney, Cynthia P. Coad, Beatrice J.S. Lapisto-Kirtley, Ronald O. Loveridge, Jon D. Mikels, Leonard Paulitz, Cynthia Vedugo-Peralta, and S. Roy Wilson), and its Executive Officer (Barry S. Wallerstein) were defendants and appellees below.

The Natural Resources Defense Council, Coalition for Clean Air, Communities for a Better Environment, Inc., Planning & Conservation League, and Sierra Club intervened as defendants and were appellees in the court of appeals.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 309 F.3d 550. The opinion of the district court granting summary judgment for respondents (Pet. App. 3a-27a) is reported at 158 F. Supp. 2d 1107.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2002, and a petition for rehearing was denied on December 11, 2002. Pet. App. 2a, 28a-29a. The petition for a writ of certiorari was filed on March 11, 2003, and was granted on June 9, 2003. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, U.S. Const. art. VI, cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 209(a) of the Clean Air Act, 42 U.S.C. § 7543(a), provides:

> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

The Fleet Rules promulgated by respondent South Coast Air Quality Management District appear at pages 16-74 of the Joint Appendix.

STATEMENT

This case concerns the scope of Section 209(a) of the Clean Air Act, 42 U.S.C. § 7543(a), which expressly preempts state and local "standard[s] relating to the control of emissions from new motor vehicles." This Court has observed that by this language "Congress has largely preempted the field with regard to 'emissions from new motor vehicles.'" *Washington* v. *General Motors Corp.*, 406 U.S. 109, 114 (1972).

Respondent South Coast Air Quality Management District ("SCAQMD" or "the District"), a local governmental body in California, has adopted "Fleet Rules" that prohibit an operator of a fleet of 15 or more vehicles from purchasing certain types of new motor vehicles because of those vehicles' emission characteristics. The Fleet Rules are preempted "standard[s] relating to the control of emissions" under Section 209(a). They were adopted with the undisputed purpose and effect of reducing motor vehicle emissions by prohibiting the purchase of certain new motor vehicles otherwise approved for sale in California by the federal and state governments.

Unlike stationary sources of air pollution such as factories and power plants — over which the States retain substantial regulatory authority, subject to general oversight by the United States Environmental Protection Agency ("EPA") (see 42 U.S.C. §§ 7401-7515; *Washington*, 406 U.S. at 114) — mobile sources of air pollution (particularly new motor vehicles) are regulated exclusively by federal law, subject to narrow exceptions allowing the State of California to adopt and enforce standards relating to new motor vehicle emissions, but only with the approval of EPA, 42 U.S.C. § 7543(b).

States other than California, under certain limited conditions set forth in Section 177 of the Clean Air Act, may also adopt California's motor vehicle emission standards as to which EPA has waived preemption, 42 U.S.C. § 7507. Under no circumstances, however, may any State (including California) impose any standard relating to the control of new motor vehicle emissions without the express approval of EPA. Nor may any local governmental body impose standards relating to the control of emission from new motor vehicles.

The Fleet Rules at issue in this case are not covered by any of the limited exceptions in the Clean Air Act for state motor vehicle emission standards. First, the District is not a State. Second, the Fleet Rules vary from the EPA-approved standards adopted by the State of California by prohibiting the purchase of certain vehicles that already have been approved for sale in the State. Third, the Fleet Rules have never been approved by EPA.

If the District can adopt local standards banning the purchase of certain new motor vehicles based on their emission characteristics, then other local governments can do the same. Such action would directly contravene the express, and plainly stated, provisions of the Clean Air Act that prohibit the adoption of such standards except in strict accordance with EPA's preemption waiver procedures. Allowing the District's Fleet Rules to stand would undermine Congress's determination that — to prevent chaos in the motor vehicle industry — only the federal government and the State of California, with EPA's approval, should be permitted to establish standards relating to emissions from new motor vehicles.

A. The Clean Air Act.

The Clean Air Act (42 U.S.C. §§ 7401-7671q) divides the sources of air pollution into two categories — stationary and mobile — and provides fundamentally different regulatory regimes for each. Title I of the Act, which regulates stationary

sources of air pollution, directs EPA to establish "national ambient air quality standards" and requires each State to submit for EPA review and approval a "state implementation plan" for meeting those standards. 42 U.S.C. §7408. The plan must identify and describe the state emission control regulations adopted for sources of air pollution in the State.

Title II of the Act (42 U.S.C. §§ 7521-7590), which is at issue here, regulates mobile sources of air pollution, primarily motor vehicles. "In contrast to federally encouraged state control over stationary sources, regulation of motor vehicle emissions ha[s] been a principally federal project." *Engine Mfrs. Ass'n* v. *EPA*, 88 F.3d 1075, 1079 (D.C. Cir. 1996).

1. The first time Congress mandated the exercise of federal regulatory authority to reduce air pollution was in 1965, when Congress directed the federal government to regulate emissions from new motor vehicles and new motor vehicle engines. Pub. L. No. 89-272, § 101(8), 79 Stat. 992 (1965) (42 U.S.C. § 1857f-1 (Supp. IV, 1966-1968)). Despite the enactment of this statute and the adoption of a regulation establishing emission levels in 1966 (see 31 Fed. Reg. 5,170 (1966)), "[a] number of states * * * continued to develop separate emission programs. Congress thereupon promptly amended the Clean Air Act in 1967 to impose federal preemption." *Motor Vehicle Mfrs. Ass'n* v. *New York State Dep't of Envtl. Conservation*, 17 F.3d 521, 525 (2d Cir. 1994) ("*MVMA*"); see also H.R. Rep. No. 728, 90th Cong., 1st Sess. 21 (1967) (preemption is "necessary in order to prevent a chaotic situation from developing in interstate commerce in new motor vehicles"); S. Rep. No. 403, 90th Cong., 1st Sess. 33 (1967) (under federal preemption, "industry * * * will be able to minimize economic disruption and therefore provide emission control systems at lower costs to the people of the Nation").

The express preemption provision adopted by Congress, now Section 209(a) of the Act (codified at 42 U.S.C.

§ 7543(a)), contains two separate restrictions on state authority. First, "[n]o State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part." Second, "[n]o State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment."

The provision also contains a savings clause, now codified in Section 209(d), in which Congress delineated the outer boundaries of its preemption of state and local law. It provides that "[n]othing in this title shall preclude or deny to any State or political subdivision the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles." Pub. L. No. 90-148, § 2, 81 Stat. 501 (1967) (codified as amended at 42 U.S.C. § 7543(d)). Thus, the States retained authority to regulate the use, operation, or movement of motor vehicles only through means *other than* standards or approvals relating to the control of emissions from new motor vehicles or new motor vehicle engines.

Congress permitted only one exception to Section 209(a)'s expansive preemption. During the debate on the 1967 statute, "representatives of the State of California were clearly opposed to displacing that State's right to set more stringent standards to meet peculiar local conditions." S. Rep. No. 403, at 33. Congress concluded that "California's unique problems and pioneering efforts justified a waiver of the preemption section to the State." *Ibid.*

Accordingly, the statute requires the federal government to waive application of the preemption section to a standard adopted by the State of California unless EPA finds that the State "[did] not require standards more stringent than applica-

ble Federal standards to meet compelling and extraordinary conditions" or that the California standard was inconsistent with the rule-making criteria established by federal law. Pub. L. No. 90-148, § 2, 81 Stat. 501 (now codified, as subsequently amended, at Section 209(b), 42 U.S.C. § 7543(b)). The statute, by its terms, made the waiver process available to any State that had adopted motor vehicle emission control standards prior to March 30, 1966, but California was the only State that satisfied that test. *MVMA*, 17 F.3d at 525.

Given the broad language in Section 209(a), and the limited exception for California in Section 209(b), it is not surprising that when this Court surveyed federal law with respect to air pollution in 1972 it observed that "Congress has largely preempted the field with regard to 'emissions from new motor vehicles.'" *Washington*, 406 U.S. at 114 (citing Section 209(a)); see also *Motor & Equip. Mfrs. Ass'n* v. *EPA*, 627 F.2d 1095, 1109 (D.C. Cir. 1979) ("*MEMA*") ("Congress in 1967 expressed its intent to occupy the regulatory role over emissions control to the exclusion of all the states, all, that is, except California"); *City of Chicago* v. *General Motors Corp.*, 467 F.2d 1262, 1264 (7th Cir. 1972) (footnote omitted) (Section 209(a) preempts "the entire field of standards for emissions from new motor vehicles").

Congress's approach with respect to emissions from new motor vehicles stands in sharp contrast to the path that it took with respect to stationary sources of air pollution. Although under Title I of the Act, the federal government sets the national ambient air quality standards that establish permissible concentrations of various types of air pollutants, "it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met." *Train* v. *NRDC*, 421 U.S. 60, 79 (1975) (footnote omitted); see also *id.* at 79 n.16 (characterizing the federal government's authority over emissions from new motor

vehicles as an "[e]xception" to this approach); *Washington*, 406 U.S. at 115 ("[s]o far as factories, incinerators, and other stationary devices are implicated, the States have broad control * * *").

To confirm the leading role for the States in controlling *non-mobile* sources of air pollution, Congress enacted a general savings clause in Title I, 42 U.S.C. § 7416, preserving "the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution." Nevertheless, to confirm federal authority over *mobile* sources of air pollution, Congress expressly excepted the "standard[s] relating to the control of emissions from new motor vehicles" set forth in Section 209(a) from that savings clause.

Congress has amended the Clean Air Act several times since 1967, but it has not altered the basic scheme that establishes the federal government as preeminent with respect to the regulation of pollution from new motor vehicles and motor vehicle engines. To this day, only two sets of standards relating to new motor vehicle emissions are permissible — those adopted by the federal government and those adopted by the State of California for which EPA has granted a waiver.

2. Congress in 1977 amended the motor vehicle provisions of the Clean Air Act in two relevant respects. First, it allowed certain States other than California — under conditions "carefully circumscribed to avoid placing an undue burden on the automobile manufacturing industry" (*MVMA*, 17 F.3d at 527) — to adopt, in whole, California standards as to which the federal government has waived preemption. Section 177 of the Act, 42 U.S.C. § 7507, excludes from the preemptive scope of Section 209(a) "standards relating to control of emissions" and "such other actions as are referred to in [Section 209(a)] if * * * such standards are identical to the California standards for

which a waiver has been granted for such model year" and if both California and the other State adopt the standards at least two years before the commencement of the model year. Thus, "[r]ather than being faced with 51 different standards, as they had feared, or with only one, as they had sought, manufacturers must cope with two regulatory standards * * *." *Engine Mfrs. Ass'n*, 88 F.3d at 1080.

The 1977 amendments also revised the statutory test for granting a request by California for a waiver of preemption. The principal change was to require the federal government "to consider California's standards as a package, so that California could seek a waiver from preemption if its standards 'in the aggregate' protected public health at least as well as federal standards." *MVMA*, 17 F.3d at 525. In addition, Congress directed the federal government in considering a waiver request under Section 209(b) of the Act to accord deference to the State's judgment regarding the effect of its standards on the public health and welfare. 42 U.S.C. § 7543(b) (Pub. L. No. 95-95, § 207, 91 Stat. 755 (1977)).

3. Congress again revisited the Clean Air Act in 1990. It added a second paragraph to Section 177 — the provision authorizing other States to adopt California standards that received a Section 209(b) preemption waiver — to emphasize the strict limitations on the authority of such a State:

> Nothing in this section or [in the title of the Act concerning mobile source pollution] shall be construed as authorizing any * * * State [that adopts California standards] to prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle or motor vehicle engine that is certified in California as meeting California standards, or to take any action of any kind to create, or have the effect of creating, a motor vehicle or motor vehicle engine different than a motor vehicle or engine certified in California under

> California standards (a "third vehicle") or otherwise create such a "third vehicle."

Pub. L. No. 101-549, § 232, 104 Stat. 2529 (1990). This language was added to "codif[y], in effect, Congress's understanding of the authority originally [given] to states by Section 177 as expressed in the legislative history of Section 177 when it was adopted in 1977." Clean Air Conference Report (Oct. 27, 1990), A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990 1001, 1021-1022 (1993); see also Exhibit 1 (Oct. 27, 1990), *id.* at 790 (entered by Sen. Mitchell) (describing the amendment to section 177 as "a mere clarification of current law").

Congress in 1990 also required some States that had failed to reduce air pollution levels in accordance with national ambient air quality standards to force operators of fleets of cars and trucks to purchase specified percentages of vehicles that "would be substantially cleaner than conventional vehicles." H.R. Conf. Rep. 101-952, 101st Cong., 2d Sess. 337 (1990). Each State must submit to EPA for approval an implementation plan setting forth the emission limitations and other rules adopted by the State — relating principally to the regulation of stationary sources such as power plants and factories — that are designed to produce compliance with the federal air quality standards and other requirements of the Act. See generally *General Motors Corp.* v. *United States*, 496 U.S. 530, 533 (1990); *Train*, 421 U.S. at 79-80.

The 1990 amendments provide that a State that has failed to attain specified air quality levels must submit for EPA approval a revised implementation plan that requires operators of centrally fueled fleets of ten or more specified types of vehicles to purchase a designated percentage of "clean-fuel vehicles." Section 246, 42 U.S.C. § 7586 (Pub. L. No. 101-549, § 229(a), 104 Stat. 2520). A "clean-fuel vehicle" is one that meets the clean-fuel vehicle emission standards established

under the Act (Section 241(7), 42 U.S.C. § 7581(7) (Pub. L. No. 101-549, § 229(a), 104 Stat. 2513)).

Significantly, the Clean Air Act's "clean-fuel fleet" provisions state that "[t]he plan revision * * * shall provide that the choice of clean-fuel vehicles and clean alternative fuels shall be made by the covered fleet operators subject to the requirements" of Section 246. Section 246(d), 42 U.S.C. § 7586(d). The provisions also broadly define "clean alternative fuel" as "any fuel (including methanol, ethanol, or other alcohols * * *, reformulated gasoline, diesel, natural gas, liquefied petroleum gas, and hydrogen) or power source (including electricity) used in a clean-fuel vehicle that complies" with the standards established under the Act (Section 241(2), 42 U.S.C. § 7581(2)); and apply only to limited percentages of a fleet operator's covered fleet vehicles (Section 246(b)-(c), 42 U.S.C. § 7586(b)-(c)). Thus, the "clean-fuel fleet" provisions do not authorize States (much less local governments) to limit a fleet operators' ability to choose among the various types of clean-fuel vehicles that otherwise comply with the applicable emission regulations.

Finally, Congress authorized the federal government to excuse a State from its obligation to impose a "clean-fuel fleet" purchasing requirement if the State proposed an alternative approach that would achieve emission reductions equal to those that would be achieved under a fleet purchasing rule. 42 U.S.C. § 7511a(c)(4)(B).

B. The California Motor Vehicle Emission Regulations.

California law designates the California Air Resources Board ("CARB") as "the air pollution control agency for all purposes set forth in federal law" (Cal. Health & Safety Code § 39602) and vests CARB with authority to promulgate regulations addressing air pollution resulting from motor vehicles, including limitations on emissions from new motor vehicles and new motor vehicle engines. See *id.* §§ 39003,

43013, 43018, 43100-43108. Three sets of CARB's regulations are relevant here.

1. CARB's low-emission vehicle ("LEV") program, governing low-emission passenger cars and medium-duty vehicles, was adopted in 1990 and 1991 and applies to 1994 to 2003 model-year vehicles. Cal. Code Regs. tit. 13, § 1960.1; Pet. App. 13a; CARB, *Low-Emission Vehicle Program*, at http://www.arb.ca.gov/msprog/levprog/evprog.htm (last updated Oct. 2, 2002). In 1999, CARB adopted "LEV II" rules, which are applicable to the 2004 and later model years. See Cal. Code Regs. tit. 13, § 1960(a); CARB, *Low-Emission Vehicle Program*, at http://www.arb.ca.gov/msprog/levprog/levprog.htm (last updated Oct. 2, 2002). Although the numerical requirements differ, the basic structure of the two programs is substantially similar. The rules establish different tiers of emission regulation, which are, in order of increasing stringency: Transitional Low-Emission Vehicles ("TLEVs"), which include diesel-fueled vehicles; Low-Emission Vehicles ("LEVs"); Ultra-Low-Emission Vehicles ("ULEVs"); Super-Ultra-Low-Emission Vehicles ("SULEVs"); and Zero-Emission Vehicles ("ZEVs"). Each tier has a set of emission limitations for carbon monoxide, formaldehyde, non-methane organic gases, oxides of nitrogen, and particulate matter. Cal. Code Regs. tit. 13, §§1960.1(e)(3), (g), (h)(2), (p) (LEV I); *id.* § 1961(a) (LEV II). A vehicle may be sold in California only if it qualifies under one of these categories. See Cal. Health & Safety Code §§ 43009, 43016-43017, 43102, 43105.

The LEV program further requires that vehicles that a single manufacturer delivers for sale in California must meet overall fleet average emission requirements. These requirements are reduced over time, "requiring manufacturers to sell progressively cleaner mixes of vehicles." Pet. App. 14a; see Cal. Code Regs. tit. 13, § 1960.1(g)(2) (LEV I); *id.* § 1961(b) (LEV II). "Automobile manufacturers, under CARB's regulations, have the flexibility to decide how many vehicles of each

type they manufacture and sell in order to meet the fleet average." Pet. App. 14a. Additional flexibility is provided through establishment of a marketable credit system: manufacturers may earn credits against the non-methane organic gas emission standards by exceeding the fleet average requirements, and against the ZEV requirements by creating Partial Zero-Emission Vehicles ("PZEVs"), reducing carbon dioxide emissions, or increasing fuel efficiency. Cal. Code Regs. tit. 13, § 1960.1(g)(2) (note 7 to appended table of fleet average emission requirements) (non-methane organic gas credits); *id.* § 1961(c)(1) (same); *id.* § 1962(g) (ZEV credits).

In 1993, EPA granted California a waiver of federal preemption under Section 209(b) for the LEV program applicable to light-duty vehicles. 58 Fed. Reg. 4,166 (1993). California's LEV program for medium-duty vehicles received preemption waivers from EPA in 1994 (59 Fed. Reg. 48,625 (1995 and later model years)) and in 1998 (63 Fed. Reg. 18,403 (1998 and later model years)). In April 2003, EPA granted a preemption waiver for California's LEV II amendments as they apply to light-duty and medium-duty vehicles — except with respect to California's ZEV program. 68 Fed. Reg. 19,811. CARB initially sought but later withdrew its requests for EPA consideration of California's ZEV program. 67 Fed. Reg. 60,680 (2002).

In addition to granting California's LEV program a waiver from federal preemption, EPA also approved that program as a substitute for the federal "clean-fuel fleet" program required by Section 246 for "nonattainment" areas in the State. 64 Fed. Reg. 46,849 (1999). But for EPA's approval of California's LEV program as a substitute, six "nonattainment" areas in California, including the South Coast Air Basin, would have been required by Section 246 to adopt federal "clean-fuel fleet" programs. 64 Fed. Reg. 46,850.

2. CARB promulgated an emission control program for heavy-duty urban transit buses (the "Urban Bus Program") in February 2000. See CARB News Release, *ARB Cuts Emissions From Transit Buses* (Feb. 24, 2000), at http://www.arb.ca.gov/newsrel/nr022400.htm (viewed Aug. 18, 2003). One element of the program establishes increasingly stringent emission standards for new urban buses and bus engines. Cal. Code Regs. tit. 13, § 1956.1(a)(6)-(12).

The Urban Bus Program also imposes a ceiling on the average emission level of a bus fleet operated by a public transit agency. CARB nonetheless respected fleet operators' need "to determine their optimal fleet mix in consideration of such factors as air quality benefits, service availability, cost, efficiency, safety, and convenience." Accordingly, CARB established "two paths to compliance with this fleet rule * * *: the alternative-fuel path and the diesel path." Cal. Code Regs. tit. 13, § 1956.2(a).

Operators choosing the diesel path are obligated to retrofit a larger number of existing buses to reduce nitrogen oxide emissions than those choosing the alternative-fuel path (see Cal. Code Regs. tit. 13, § 1956.2(f)(2)-(3)) and must purchase a specified minimum number of zero emission buses (see *id.* § 1956.3(c)). The alternative-fuel path requires that at least 85% of new buses be capable of operating on alternative fuel, which is defined as "natural gas, propane, ethanol, methanol, electricity, fuel cells, or advanced technologies that do not rely on diesel fuel" (*id.* § 1956.2(b)(1)); a lesser retrofit obligation (see *id.* § 1956.2(f)(2)-(3)); and a deferred obligation to purchase zero-emission buses (see *id.* § 1956.3(c)). All operators, regardless of the path selected, must retrofit existing buses to reduce particulate emissions. *Id.* § 1956.2-1956.3; Pet. App. 15a.[1]

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[1] CARB Board Resolution 00-02 at 6 (Feb. 24, 2000), available at http://www.arb.ca.gov/regact/bus/res00-2.pdf (viewed Aug. 18, 2003), (continued...)

3. CARB also has developed an emission control program for heavy-duty vehicles (those over 14,000 pounds in gross vehicle weight rating), including diesel-fueled trucks. Under CARB's Heavy-Duty Vehicle Program, emission limits are established for oxides of nitrogen, non-methane hydrocarbons, particulate matter, and carbon monoxide. Heavy-duty vehicles that CARB certifies as meeting those emission limits may be sold throughout the State. Cal. Code Regs. tit. 13, §§ 1956.8, *et seq.* (2003); CARB, *On-Road Heavy-Duty Vehicle Program*, at http://www.arb.ca.gov/msprog/onroadhd/onroadhd.htm (last updated May 12, 2003).

Significantly, and in recognition of the need for regulatory uniformity in the capital-intensive heavy-duty vehicle market, CARB's Heavy-Duty Vehicle Program standards are largely identical to, and incorporate by reference, the standards EPA has adopted for heavy-duty vehicles. Compare Cal. Code Regs. tit. 13, §§ 1956.8, *et seq.* with 40 C.F.R. Part 86; see also J.A. 163, 165. As a result of these standards, "[heavy-duty] diesel vehicles will [during 2007 to 2010] achieve gasoline-like exhaust emission levels, in addition to their inherent advantages over gasoline vehicles with respect to fuel economy, greenhouse gas emissions, and lower evaporative hydrocarbon emissions." 66 Fed. Reg. 5,005 (2001).

C. The Challenged Fleet Rules.

The District is a political subdivision of the State of California. It is a regional entity responsible for "implement[ing] a strategy for achieving and maintaining ambient air quality standards within the South Coast Air Basin," which consists of parts of Los Angeles, San Bernardino, Riverside and

[1](...continued)
directed CARB's Executive Officer to forward the details of the Urban Bus Program to EPA and request "a waiver or confirmation that the regulations are within the scope of an existing waiver" under Section 209(b). According to EPA's on-line docket, however, CARB's waiver request for the Urban Bus Program has not yet been submitted to EPA.

Orange Counties. Pet App. 4a-5a; see Cal. Health & Safety Code § 39052.5, 40402, 40410-40412, 40440-40459. The district court in this case stated that the South Coast Air Basin "experiences the most serious air quality problems in the nation, primarily due to motor vehicle pollution." Pet. App. 5a.

The California legislature in 1987 authorized the District to adopt regulations governing vehicle purchases by operators of "public and commercial vehicle fleets" of 15 or more vehicles. Cal. Health & Safety Code § 40447.5. With some exceptions, the District was permitted to require such operators "to purchase vehicles which are capable of operating on methanol or other equivalently clean burning alternative fuel and to require that these vehicles be operated, to the maximum extent feasible, on the alternative fuel when operating" in the District. *Ibid.*

In June, August and October 2000, the District promulgated a series of six "Fleet Rules" regulating purchases or leases of new vehicles by various private and public operators (including federal, state, regional, county, and city departments and agencies) of commercial fleets to "reduce air toxic and criteria pollutant emissions." J.A. 16. Each of the Rules addresses a separate type of vehicle fleet, but all follow a common approach, prohibiting fleet operators from purchasing many types of new vehicles — including some low-emission vehicles and all diesel-fueled vehicles — that are certified by CARB for sale within California.

For example, Rule 1194 (J.A. 58-65) applies "to all public and private fleet operators of fifteen (15) or more vehicles operated by the airport authority or any other public or private fleet operators that transport passengers from commercial airports located in the District." Rule 1194(b) (J.A. 58). It imposes separate restrictions on different types of transportation providers, as follows:

- For operators "providing limousine or transit shuttle services out of commercial airport terminals to the public

through the collection of fares or fees, or [that] provide courtesy pickup services out of commercial airport terminals," any new passenger car or medium-duty vehicle purchase or lease "shall be a vehicle that has been certified by CARB that meets the ULEV, SULEV, or ZEV emission standards." Rule 1194(d)(1) (J.A. 61-62). These operators are barred from purchasing or leasing other vehicles that also are certified by CARB and therefore permitted to be sold in California — such as those meeting the TLEV and LEV emissions standards. See Cal. Code Regs. tit. 13, § 1960.1(g)(2) (LEV I fleet average requirements permitting sale of TLEVs and LEVs as part of manufacturers total fleet of vehicles); *id.* § 1961(b) (same for LEV II).

• Operators of "shuttle van services that provide multiple-party passenger transportation services to commercial airport terminals and do not operate on fixed or scheduled routes" were subjected to a phased-in requirement: from July 1, 2001, through June 30, 2002, half of their purchases or leases of new passenger cars or medium-duty vehicles were required to be CARB-certified as meeting ULEV, SULEV, or ZEV emission standards; beginning July 1, 2002, all purchases and leases had to meet this standard. Rule 1194(d)(2) (J.A. 62). As noted above (at pages 11-12), CARB's rules permit the purchase and lease within California of new passenger cars and medium-duty vehicles that do not meet these particular standards.

• For providers of "shuttle services to the public in and out of airport terminals to airport parking lots, car rental lots, or hotels/motels, all new heavy-duty transit vehicle purchases or leases shall be alternative-fueled vehicles," (Rule 1194(d)(3) (J.A. 62)), which the Rule defines as a "vehicle or engine that is not powered by gasoline or diesel fuel," (Rule 1194(c)(2) (J.A. 59)). Under CARB's rules, heavy-duty transit vehicles powered by gasoline or diesel

fuel are CARB-certified and may be sold within California. See Cal. Code Regs. tit. 13, § 1956.1(a)(6)-(12).

• Finally, for fleet operators "providing taxicab pickup services out of commercial airport terminals," any new purchase or lease of a passenger car or medium-duty vehicle to perform such services "shall [only] be a vehicle that has been certified by CARB that meets the ULEV, SULEV, or ZEV emission standards" (Rule 1194(d)(4) (J.A. 62-63)), despite the availability of other CARB-certified vehicles, including diesel-powered vehicles (see page 11, *supra*). The Rule provides for an exemption for such operators if the District has failed to make available a subsidy to cover any amount in excess of $10,000 that the operator is required to pay for such a vehicle. Rule 1194(e)(3) (J.A. 63-64).

Rule 1194 contains exemptions for situations in which the operator demonstrates to the District that the vehicle required under the Rule is not available commercially or could not be used; for vehicles converted to be wheelchair accessible; and for buses "used for the express purpose of providing long-distance service." Rule 1194(e)(1)-(2), (4) (J.A. 63-64).

Each of the other Fleet Rules follows the same approach for different types of fleets: public and private street-sweeper fleet operators (Rule 1186.1 (J.A. 16-23)); public fleet operators of passenger cars, light-duty trucks, or medium-duty vehicles (Rule 1191 (J.A. 24-45)); public transit fleet operators (Rule 1192 (J.A. 46-51)); public and private solid waste collection fleet operators (Rule 1193 (J.A. 52-57)); and public fleet operators of heavy-duty vehicles (Rule 1196 (J.A. 66-74)). In each instance, the purchase of certain low-emission vehicles and all covered diesel-fuel vehicles is generally prohibited. See Pet. App. 16a-19a.

D. The Proceedings Below.

Petitioner Engine Manufacturers Association commenced this action against respondent SCAQMD in the United States District Court for the Central District of California asserting that the Fleet Rules are preempted by Section 209(a) of the Clean Air Act and seeking an injunction barring the District from enforcing those Rules. Petitioner Western States Petroleum Association intervened as a plaintiff; and respondents Natural Resources Defense Council, Coalition for Clean Air, Communities for a Better Environment, Inc., Planning & Conservation League, and Sierra Club intervened as defendants. Pet. App. 19a-20a.

The district court granted respondents' motion for summary judgment (Pet. App. 3a-27a). The court recognized that the First and Second Circuits had held that state-imposed requirements regarding the sales of motor vehicles constitute a "standard relating to the control of emissions" preempted by Section 209(a). Pet. App. 23a. Nonetheless, the district court stated that "[i]t does not follow, however, that a rule regulating the *purchase* of vehicles is such a standard." *Ibid.* (emphasis in original). "Where a state regulation does not compel manufacturers to meet a new emissions limit, but rather affects the purchase of vehicles, as the Fleet Rules do, that regulation is not a standard. No restriction on the sale of vehicles is present here. Plaintiffs may continue to sell any vehicle which is otherwise certified in California." *Ibid.*

The district court also relied on Section 246's requirement that some States require fleet operators to purchase certain low-emission vehicles. "It is not rational to conclude that the [Clean Air Act] would authorize purchasing restrictions on the one hand, and prohibit them, as a prohibited adoption of a 'standard,' on the other." Pet. App. 23a.

Finally, the district court concluded that Section 177's requirement that a State adopt standards "identical" to California's to be exempt from preemption was not applicable because it referred only to "the non-California 'opt-in' states." Pet. App. 26a. The court also determined that the District's Fleet Rules did not impose a "third car" requirement in violation of Section 177 because "they require purchasers to choose from among a subset of previously certified vehicles. Automobile manufacturers will not be forced to do something more than they already must." Pet. App. 27a. "The Fleet Rules may lead to decreased demand for some cars and trucks certified in California, but the Rules do not require the manufacturers to build or sell any particular model for this area." *Ibid.*

The Ninth Circuit affirmed the judgment "for the reasons stated in" the district court's "well-reasoned opinion." Pet. App. 1a-2a. The court of appeals subsequently denied rehearing. Pet. App. 28a-29a.

SUMMARY OF THE ARGUMENT

Section 209(a) of the Clean Air Act prohibits any "State or any political subdivision thereof" from "adopt[ing] or attempt[ing] to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines." This provision sweeps broadly and encompasses the emissions-based purchasing restrictions imposed on fleet operators by the Fleet Rules at issue in this case.

The District's Fleet Rules prohibit the purchase of certain new motor vehicles — including all diesel-fueled vehicles — based on the emission characteristics of those vehicles. As a result, the Rules are "standard[s] relating to the control of emissions from new motor vehicles" preempted by Section 209(a). The distinction drawn by respondents and the courts below between purchase prohibitions (which they contend are not preempted) and sales restrictions (which they acknowledge are preempted) finds no support in the text of Section 209(a) or the Clean Air Act's regulatory scheme. Indeed, the distinction

is illusory; every sale includes a purchase and every purchase includes a sale.

The Fleet Rules also expressly refer to and incorporate a subset of the emission standards adopted by CARB. That subset includes only the most stringent and restrictive of the broader range of CARB emission standards and phase-in provisions. The Fleet Rules amount to a new and different set of standards adopted for the undisputed purpose of controlling emissions. If the District can adopt these standards, then other state and local governments can as well. The congressional scheme for regulating mobile sources of emissions would be gutted.

No provision of the Clean Air Act — not the preemption waiver provision for California (Section 209(b)), the "opt-in" provision allowing other States to adopt California emission standards that have been approved by EPA (Section 177), nor the clean-fuel fleet provisions (Section 246) — saves the Fleet Rules from federal preemption. The District is not a State. The Fleet Rules vary from the EPA-approved standards adopted by the State of California. And the Fleet Rules have never been approved by EPA.

ARGUMENT

The District's Fleet Rules are "standard[s] relating to the control of emissions from new motor vehicles" and are, therefore, preempted by Section 209(a) of the Clean Air Act. The contrary holding of the courts below — based on the conclusion that the Fleet Rules are beyond the reach of Section 209(a) because they proscribe purchases, not sales (see Pet. App. 2a, 23a) — is untenable. It ignores the broad language of Section 209(a), the entire regulatory scheme for controlling motor vehicle emissions under the Clean Air Act, and the purpose and effect of the Fleet Rules themselves.

If the Fleet Rules were not preempted emission standards, then any state or local government could adopt rules permitting

or prohibiting any motor vehicle purchases (whether by fleet operators or individuals) based on the emissions characteristics of those vehicles.[2] The balkanized regulatory scheme that would result is the very sort of "chaotic situation" Congress sought to avoid by preempting state and local regulation of motor vehicle emission standards. See pages 4-7, *supra*. Such localized variation will disrupt "interstate commerce in new motor vehicles" and undermine the regulatory regime created by Congress for mobile sources in Title II of the Act. H.R. Rep. 728, at 21.

I. SECTION 209(A) ENCOMPASSES RESTRICTIONS ON PURCHASES OF NEW MOTOR VEHICLES SUCH AS THE DISTRICT'S FLEET RULES

Whether the Clean Air Act preempts the Fleet Rules is determined by the text of Section 209(a). Where, as here, a federal statute "contains an express pre-emption clause, [the] task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 62-63 (2002) (quoting *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993)) (internal quotation marks omitted).

The courts below, and respondents, mistakenly relied on a "presumption" against federal preemption of traditional state "police powers" in seeking to narrow the scope of Section 209(a). Pet. App 2a, 9a. But such a presumption has no bearing on this case, where "Congress has made clear its desire for preemption." *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 146 (2001). Moreover, the presumption applies only when Congress legislates "in a field which the States have traditionally occu-

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[2] The statute preempts state and local standards applicable to both "new motor vehicles" and "new motor vehicle engines." For ease of reference, we include both "new motor vehicles" and "new motor vehicle engines" in referring to "motor vehicles."

pied" (*United States* v. *Locke*, 529 U.S. 89, 108 (2000) (quoting *Rice* v. *Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))), and not in a field "where there has been a history of significant federal presence" (529 U.S. at 108). In this case, there is no "tradition" of state regulation of motor vehicle emissions — only a single State had adopted emission standards at the time Congress enacted the relevant provisions of the Clean Air Act. See pages 5-6, *supra*. To the contrary, there have been decades of a "significant federal presence" in the field. *Locke*, 529 U.S. at 108.

The preemption inquiry in this case begins and ends with the text of Section 209(a), which "provides a reliable indicium of congressional intent with respect to state authority." *Cipollone*, 505 U.S. at 517 (internal quotation marks omitted). Section 209(a) plainly demonstrates Congress's intent to preempt regulations like the Fleet Rules.

A. The Plain Language Of Section 209(a) Establishes That A Rule Barring The Purchase Of New Motor Vehicles Based On Their Emission Characteristics Is A Preempted "Standard Relating To The Control Of Emissions."

The first sentence of Section 209(a) is written in expansive terms: "No State or any political subdivision thereof shall adopt or attempt to enforce ***any standard relating to*** the control of emissions for new motor vehicles or new motor vehicle engines subject to this part." 42 U.S.C. § 7543(a) (emphasis added). This language "largely preempt[s] the field with regard to 'emissions from new motor vehicles.'" *Washington*, 406 U.S. at 114; see also *American Auto. Mfrs. Ass'n* v. *Cahill*, 152 F.3d 196, 198 (2d Cir. 1998) ("Under Section 209 of the Clean Air Act, exclusive control over 'standards relating to the control of emissions from new motor vehicles' is vested in the federal government, and the states are preempted from regulating in the area."); *MVMA*, 17 F.3d at 526 (the "cornerstone of Title II [of

the Clean Air Act] is Congress' continued preemption of state regulation of automobile emissions").

Despite the provision's broad language, the courts below concluded that, although Section 209(a) has been properly construed to preempt state laws regulating sales of new motor vehicles based on the vehicles' emission characteristics,[3] "[i]t does not follow * * * that a rule regulating the *purchase* of vehicles is such a standard." Pet. App. 23a (emphasis in original). That construction of the statute cannot withstand even casual scrutiny in light of the breadth of Section 209(a)'s prohibition against "adopt[ing] or attempt[ing] to enforce any standard relating to the control of emissions," which is evident from each element of the language Congress used in crafting the provision.

First, the statute proscribes "***any*** standard." The term "any" generally means a thing "selected without restriction or limitation of choice," and when used as a modifier — as in Section 209(a) — "any" indicates "the maximum or whole of a number or quantity." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (1986). Congress's use of the word "any" in a statute "undercuts a narrow construction" of the provision. *United States* v. *James*, 478 U.S. 597, 605 (1986), abrogated on other grounds by *Central Green Co.* v. *United States*, 531 U.S. 425 (2001); see also *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 588-589 (1980) (Congress's use of the "expansive" term "any" "offer[ed] no indication whatever that Congress intended the limiting construction" of the statute urged by the respondents); *Shea* v. *Vialpando*, 416 U.S. 251, 260 (1974) (interpreting Congress's use of the word "any" to

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[3] See *Ass'n of Int'l Auto. Mfrs.* v. *Commissioner*, 208 F.3d 1, 6-7 (1st Cir. 2000) ("a requirement that a particular percentage of vehicle sales be ZEVs has no purpose other than to effect a general reduction in emissions" and "must be considered 'standards relating to the control of emissions'" for purposes of Section 209(a) (quoting *Cahill*, 152 F.3d at 200)).

indicate that there was "no limitation, apart from that of reasonableness," upon statute's applicability).

Second, Congress described the object of the preemption provision in broad terms: "any ***standard***." A "standard" is a "criterion for measuring acceptability" (BLACK'S LAW DICTIONARY 1412-1413 (7th ed. 1999)) and "something that is established by authority, custom, or general consent as a model or example to be followed," *i.e.*, a "criterion" or "test" (WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2223). The word "standard" includes not only the more limited terms "law" and "regulation," but also encompasses restrictions that are the functional equivalents of standards as well. That is confirmed by the inclusion by Congress of standards that a State or local government *either* "adopt[s]" *or* "attempt[s] to enforce;" an attempt to enforce a standard never formally adopted is sufficient to trigger preemption.

Third, Section 209(a) preempts any standard "***relating to*** the control of emissions from motor vehicles," and Congress's use of the term "relate to" in an express preemption clause signals a "clearly expansive" preemptive intent. *Egelhoff*, 532 U.S. at 146; see also *Barnett Bank of Marion County, NA* v. *Nelson*, 517 U.S. 25, 38 (1996) ("The word 'relates' is highly general, and this Court has interpreted it broadly in other pre-emption contexts."); *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (the phrase "relating to" in a preemption clause "express[es] a broad preemptive purpose").

This Court has interpreted "related to" preemption clauses to invalidate state laws that have a "reference to" or a "connection with" the preempted subject matter. See, *e.g*, *Egelhoff*, 532 U.S. at 147; *California Div. of Labor Standards Enforcement* v. *Dillingham Constr. N.A., Inc.*, 519 U.S. 316, 324 (1997); *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 223 (1995). The "reference to" or "connection with" inquiry is based on whether the state or local law at issue is expressly linked in

some fashion to the subject matter that has been reserved for federal regulation. As the Court explained in *Dillingham*, a "reference" sufficient to establish preemption will be found "[w]here a State's law acts immediately or exclusively upon" the preempted subject matter, or where the preempted subject matter "is essential to the law's operation." 519 U.S. at 325.

To determine whether a state or local law has "the forbidden connection," resort must be had to "the objectives of the [federal statute] as a guide to the scope of the state law that Congress understood would survive," and "the nature of the effect of the state law on [the preempted legislative area]." *Dillingham*, 519 U.S. at 325 (internal quotation marks omitted); see also *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 656 (1995) (the Court looked to "the objectives of the [federal] statute as a guide to the scope of the state law that Congress understood would survive").

In light of these principles, the proscription against "***any standard relating to*** the control of emissions from new motor vehicles" must encompass purchase prohibitions. Whatever the outer limits of Section 209(a)'s preemptive scope, it is plain that a state or local rule that bars the purchase of some new motor vehicles and permits the purchase of others on the basis of the vehicles' respective emission characteristics is well within Section 209(a)'s prohibition. There are only a few ways to regulate motor vehicle emissions. Manufacturers may be barred from producing vehicles that do not meet specified emissions criteria; or sales, purchases, or use of new motor vehicles may be limited on the same basis. Given its expansive language, Section 209(a) necessarily encompasses such direct emission controls.

Certainly, any distinction between sale restrictions and purchase restrictions is nonsensical. Every new vehicle transaction involves the purchase of the vehicle by the purchaser and

has been certified by CARB that meets the ULEV, SULEV, or ZEV emission standards when adding or replacing a passenger car or medium-duty vehicle to their fleet.

(5) Vehicles acquired pursuant to paragraph (d)(4) must be operated within the South Coast Air Quality Management District for a minimum of three years if funding to offset the purchase cost, less $10,000 in accordance with paragraph (e)(3), was made available.

(6) Prior to January 1, 2002, airport fleet operators voluntarily purchasing an alternative-fueled vehicle meeting requirements of paragraph (d)(4) after adoption of this rule, may apply for funding to offset the purchase cost, less $10,000 in accordance with paragraph (e)(3).

(e) Exemptions

The provisions of this rule shall not apply to the following:

(1) Buses used for the express purpose of providing long-distance service (out-of-District), that are generally equipped with luggage compartments, restrooms, and overhead storage.

(2) Upon demonstration to the Executive Officer, any vehicles as required pursuant to paragraph (d) for which no alternative-fuel engine and chassis configuration is available commercially or could be used.

(3) An airport fleet operator who provides taxicab pickup services at commercial airport terminals may purchase a light- or medium-duty vehicle that is not certified by CARB as ULEV or cleaner if the SCAQMD or its designated agent has not provided sufficient funding to fully offset the purchase cost of an alternative-fueled vehicle that complies with paragraph (d)(4)

less $10,000 (paid by or on the behalf of the airport fleet operator):

(A) within 10 working days after notification by the airport fleet operator of the intent to purchase such vehicle and the airport fleet operator has provided documentation that the $10,000 is immediately available for purchase of the rule compliant vehicle, or

(B) within two working days after the airport fleet operator has notified the SCAQMD or its designated agent in the event that the taxicab vehicle to be replaced is rendered inoperable due to a roadside accident and would require immediate replacement of the taxicab vehicle. In addition, the airport fleet operator must demonstrate that the $10,000 to be provided by the airport fleet operator is immediately available for purchase of the rule compliant vehicle.

(C) Notwithstanding the provisions in paragraphs (e)(3)(A) or (e)(3)(B), the airport fleet operator shall be responsible to pay for the cost of converting the new rule compliant vehicle to meet applicable taxicab vehicle specifications and all other incidental costs including but not limited to, sales tax on the $10,000 provided by the airport fleet operator, license, and registration fees.

(D) An airport fleet operator qualifying for a non-rule compliant vehicle as provided in paragraphs (e)(3)(A) or (e)(3)(B) shall purchase the non-rule compliant vehicle within 10 working days after being notified that such vehicle could be purchased or reapply for co-funding pursuant to paragraphs (e)(3)(A) or (e)(3)(B).

(4) Vehicles not certified by CARB as ULEV or cleaner that are converted to be wheelchair accessible (to meet regulations set by the Commercial Airport Authority and all Americans with Disability Act of 1990 requirements, including door height overhead clearance as well as ramp or lift design specifications) for the purpose of providing taxicab pickup services at commercial airport terminals.

(f) Compliance Auditing and Enforcement

(1) The fleet operator shall provide at the request of the District any files and/or records created to comply with subdivision (d) including fleet-specific purchase information, such as a list of official DMV registrations, and manufacturer, model-year, model, engine family number, and fuel type of each fleet vehicle. The fleet operator shall keep all required records for a minimum of two years.

(2) Any fleet operator seeking an exemption under subdivision (f) shall supply proof that their fleet is exempted from this rule when requested by the District.

(g) Severability

If any provision of this rule is held by judicial order to be invalid, or invalid or inapplicable to any person or circumstance, such order shall not affect the validity of the remainder of this rule, or the validity or applicability of such provision to other persons or circumstances. In the event any of the exceptions to this rule is held by judicial order to be invalid, the persons or circumstances covered by the exception shall instead be required to comply with the remainder of this rule.

South Coast Air Quality Management District

(Adopted October 20, 2000)

RULE 1196. CLEAN ON-ROAD HEAVY-DUTY PUBLIC FLEET VEHICLES

(a) Purpose

For public fleets of heavy-duty vehicles operating in the South Coast Air Quality Management (District), this rule requires public fleet operators to acquire alternative-fuel heavy-duty vehicles when procuring or leasing these vehicles to reduce air toxic and criteria pollutant emissions.

(b) Applicability

This rule applies to all government agencies located in the District, including federal, state, regional, county and city government departments and agencies, and any special districts such as water, air, sanitation, transit and school districts, with 15 or more heavy-duty vehicles. This rule shall not apply to vehicles or services pursuant to paragraph (f) or vehicles subject to Rules 1192, 1193, [adopted June 16, 2000], 1194 [adopted August 18, 2000], 1195 [*proposal for school buses*] or 1186.1 [adopted August 18, 2000].

(c) Definitions

For purposes of this rule, the following definitions shall apply:

(1) ALTERNATIVE-FUEL HEAVY-DUTY ENGINE OR VEHICLE means a heavy-duty vehicle or engine that uses compressed or liquefied natural gas, propane, methanol, electricity, fuel cells, or other advanced technologies that do not rely

on diesel fuel, and has been certified by the California Air Resources Board (CARB).

(2) APPROVED CONTROL DEVICE(S) is a CARB-certified exhaust control device(s) that reduces particulate matter and possibly other precursor emissions. To be considered fitted with an approved control device(s), all diesel exhaust from the vehicle must be vented through such a device(s) that has been fitted at the time of vehicle purchase. The vehicle equipped with such a control device must use diesel fuel with a sulfur content no greater than 15 ppm.

(3) DUAL-FUEL HEAVY-DUTY VEHICLE means a heavy-duty vehicle equipped with a diesel engine that uses an alternative fuel (such as compressed or liquefied natural gas, liquefied petroleum gas, methanol, or other advanced technologies) in combination with diesel fuel to enable compression ignition. A dual-fuel engine typically uses the alternative fuel to supply 85 percent of the total engine fuel requirement on a BTU basis. A dual-fuel engine must be certified by CARB to meet an applicable optional nitrogen oxide exhaust emission standard and be fitted with a particulate matter aftertreatment control device that achieves a particulate matter emissions level no greater than the particulate matter emissions level of the latest certified M-100 methanol engine certified by CARB prior to the date of adoption of this rule.

(4) EMERGENCY OR RESCUE VEHICLE means any vehicle defined in Section 165 of the California Vehicle Code and is equipped with red lights and sirens as defined in Sections 30, 25269, and 27002 of the California Vehicle Code.

(5) FLEET VEHICLE means any heavy-duty on-road vehicle, owned or leased by a public fleet operator that totals 15 or more heavy-duty vehicles excluding vehicles exempt under paragraphs (f)(1) and (f)(2).

(6) HEAVY-DUTY VEHICLE means any vehicle having a gross vehicle weight of at least 14,000 pounds.

(7) PUBLIC FLEET OPERATOR is a person who owns, leases, or operates heavy-duty fleet vehicles in the District. A person is a federal, state, county or city government department or agency, or special district.

(8) SPECIAL DISTRICT means any public agency that provides public services such as, but not limited to, sanitation, school, transit, air, and water districts.

(9) VEHICLE means any self-propelled, motorized device that is permitted to operate on public roads through Department of Motor Vehicle registration or the federal government.

(d) Fleet Requirements

Beginning July 1, 2002, for public fleet operators with 15 or more heavy-duty vehicles, all new additions to an existing fleet, or formation of a new fleet, of heavy-duty vehicles shall be by purchase or lease of:

(1) alternative-fuel heavy-duty engine or vehicles;

(2) dual-fuel heavy-duty vehicles;

(3) dedicated gasoline heavy-duty vehicles; or

(4) If the fleet operator has an approved Technical Infeasibility Certification for this purchase or lease, as described in subdivision (e), a diesel-powered heavy-duty engine or vehicle with an approved control device and maintain that approved control device per manufacturer's specifications. The provisions of this section shall not apply to subparagraph (e)(1)(D) after June 30, 2004.

(e) Technical Infeasibility Certification Criteria and Procedures –

(1) No less than 60 days prior to the date of purchase or lease of a replacement or additional heavy-duty engine or vehicle, any fleet operator seeking to comply with paragraph (d)(4) shall demonstrate the technical infeasibility of complying with paragraph (d)(1), d(2), or (d)(3) requirements by submitting a signed and dated Technical Infeasibility Certification Request to the Executive Officer and attest to the accuracy of all statements therein, that shall include:

(A) The name and address of the public fleet operator; and

(B) Current heavy-duty vehicle fleet composition, including make, model; and

(C) Demonstration that no engine and chassis/body configuration that meets the requirements of paragraphs (d)(1), (d)(2), or (d)(3) is commercially available from any manufacturer (only technical reasons for choosing a given chassis/body configuration are acceptable) or could be used in a specific application.

(D) Demonstration that an alternative-fuel refueling station for alternative-fueled or dual-fuel heavy-duty vehicles that are commercially available from any manufacturer is not available within five miles of the vehicle storage or maintenance yards, or at locations where vehicles will be home-based for extended periods of time and the refueling supply is provided through mobile means.

(E) Demonstration that vehicles complying with paragraphs (d)(1), (d)(2), or (d)(3) exceed the incremental cost-effectiveness criteria established in accordance with the most recent requirements of the Carl Moyer Program or the Mobile Source Emission Reduction Review Committee Program, whichever is greater.

(2) Within 45 calendar days of receipt of a completed Technical Infeasibility Certification Request submitted pursuant to paragraph (e)(1), the Executive Officer will either approve or disapprove the Request, in writing. The Executive Officer shall disapprove the request if it does not meet the requirements of paragraph (e)(1). If a Technical Infeasibility Certification Request is disapproved by the Executive Officer:

(A) The reasons for disapproval shall be given to the applicant in writing.

(B) Upon receipt of a notice of a disapproved Technical Infeasibility Certification Request, the fleet operator shall comply with paragraph (d)(1), (d)(2), or (d)(3).

(C) The fleet operator may resubmit a Technical Infeasibility Certification Request at any time after receiving a disapproval notification or may apply for a variance with the SCAQMD Hearing Board. (See SCAQMD Regulation V and California Health and Safety Code Sections 42350 through 42372 for information regarding variances.), but must still comply with paragraph (d)(1), (d)(2), or (d)(3) until such time as the Executive Officer approves a Technical Infeasibility Certification Request under paragraph (e)(1) or a variance is given by the SCAQMD Hearing Board.

(3) A Technical Infeasibility Certification Request is subject to a plan filing and evaluation fees as described in Rule 306.

(f) Exemptions

The provisions of this rule shall not apply to the following:

(1) Emergency or rescue vehicles operated by local, state, and federal law enforcement agencies, police and sheriffs department, fire department, hospital, medical or paramedic facility, and used for responding to situations where potential threats to life or property exist, including but not limited to fire, ambulance calls, or life-saving calls.

(2) Privately owned or operated heavy-duty vehicle fleets that provide contract services to a public agency. Nevertheless, privately owned or operated heavy-duty vehicle fleets may be required to meet other SCAQMD rules such as Rules 1192, 1193, 1194, or 1186.1.

(3) No more than ten evaluation/test vehicles per fleet, provided by or operated by vehicle manufacturer for testing or evaluation, exclusively.

(4) Any vehicle added to or replacing a vehicle in an existing fleet after the applicable implementation date of this rule, as specified in subdivision (d), as long as the purchase contract for acquisition of such vehicle is signed before the date of adoption of this rule. This exemption does not apply to the execution of options to acquire vehicles where the option is executed after the date of adoption of this rule and where vehicle delivery does not occur until after the applicable implementation date as specified in subdivision (d).

(5) Military vehicles used for tactical operations.

(6) Heavy-duty vehicles used routinely to transport materials in and out of the District.

(7) Heavy-duty vehicles operated and housed by state agencies or special districts in the Riverside County portion of the Mojave Desert Air Basin and located within the District if the vehicles are equipped with approved control devices.

(8) When the remainder of the fleet consists of heavy-duty vehicles that meet the requirements of paragraphs (d)(1) or (d)(2),

(a) For public fleets with greater than 15 but less than 100 heavy-duty vehicles, no more than three (3) heavy-duty vehicles that do not meet the requirements of Subdivision (d) of this rule may be part of the fleet at any given

time. Such vehicles shall be equipped with approved control devices.

(b) For public fleets with 100 or more heavy-duty vehicles, no more than three (3) heavy-duty vehicles that do not meet the requirements of Subdivision (d) of this rule may be part of the fleet and are garaged, housed, parked, stored at any single vehicle storage or maintenance yard at any given time. Such vehicles shall be equipped with approved control devices. A public fleet operator may deploy these vehicles and place them at any one vehicle storage or maintenance yard if the public fleet operator submits a plan to the SCAQMD demonstrating that a proportionate number of such heavy-duty vehicles is reduced at other facilities operated by the public fleet operator.

(9) Heavy-duty vehicles leased for no more than 120 days in any 12-month period by the U.S. Postal Service during the peak winter holiday period.

(10) Heavy-duty vehicles owned or operated by federal agencies, state agencies, county agencies, or special districts whose jurisdiction include areas outside of the District and the heavy-duty vehicles are garaged, housed, parked, stored or operated within the District for no more than 180 days in any 12-month period.

(g) Compliance Auditing and Enforcement

(1) The fleet operator shall provide at the request of the District any files and/or records created to comply with subdivision (d) including

fleet-specific information, such as a list of official DMV registrations, principal vehicle location, and manufacturer, model-year, model, and fuel type and usage, of each fleet vehicle. This provision shall not apply for records that have been in existence for more than one year.

(2) Any fleet operator seeking an exemption under subdivision (f) shall supply proof that their vehicle or fleet is exempted from this rule when requested by the District.

(h) Severability

If any provision of this rule is held by judicial order to be invalid, or invalid or inapplicable to any person or circumstance, such order shall not affect the validity of the remainder of this rule, or the validity or applicability of such provision to other persons or circumstances. In the event any of the exceptions to this rule is held by judicial order to be invalid, the persons or circumstances covered by the exception shall instead be required to comply with the remainder of this rule.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

Staff Report

Proposed Rule 1191 – Clean On-Road Light- and Medium-Duty Public Fleet Vehicles

June 2000

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some for both manufacturers (who would have to keep track of what could be sold where) as well as purchasers (who would be confused about offerings that could differ from town to town). The District is not a State, and therefore cannot rely upon Section 177.

Second, Section 177 applies only if a State adopts and enforces standards that are "identical to the California standards for which a waiver has been granted for such model year." 42 U.S.C. § 7505(1). The District's standards fail this test as well. As noted above, the Fleet Rules were adopted by the District precisely to achieve an impact different from the CARB rules, which already applied within the geographic area under the District's jurisdiction. See pages 33-34, *supra*; J.A. 141, 152. Far from seeking to mirror the CARB standards, the District's entire purpose was to adopt a different, more restrictive regulatory regime, and it accomplished that goal. That is fatal under Section 177.

For example, CARB's LEV Program consists of two interrelated elements — standards establishing permissible emission levels for each of the four categories of low-emission vehicles, and standards setting the progressively lower average emission level that a manufacturers' fleet (of vehicles sold in the State each year) must meet over time. See Cal. Code Regs. tit. 13, §§ 1960.1(g)(1)-(2), § 1961(a)-(b). When CARB sought EPA approval of its LEV Program, it submitted the emission levels and the implementation mechanism together as a single interrelated program. See 58 Fed. Reg. at 4,166 (referring to amendments to California's "exhaust emission standards and test procedures" as the "California LEV program," and evaluating the disparate standards as one program for purposes of a single waiver request); see also 68 Fed. Reg. at 19,812 (using the same framework of analysis for LEV II amendments). EPA based its approval on the effect of the entire program; it did not review the emission levels alone. See generally 68 Fed. Reg. at 19,812; 58 Fed. Reg. at 4,166.

The District's Fleet Rules allow the purchase of only some of the vehicles that are permitted to be sold under CARB's LEV program, in most cases adopting an immediate prohibition of certain vehicles (typically diesel-fueled vehicles) instead of allowing manufacturers to phase in a mix of vehicles based upon yearly state-wide emission averages. The Fleet Rules also prohibit the purchase of all of the diesel-fueled trucks certified for sale under CARB's Heavy-Duty Vehicle Program. Thus, what the District has done is to take some, but not all, of the CARB emission regulations and combine them with a completely different implementation mechanism.

It is plain that the Fleet Rules are not "identical to the California standards for which a waiver has been granted for such model year," as Section 177 requires. EPA has granted a waiver to *both* the emission standards for the year *and* the fleet average emission standards that apply to the particular model year. The District's attempt to implement only a selected subset of the California standards precludes it from relying upon Section 177.

The district court emphasized that "[t]he Fleet Rules require purchasers to choose from among a subset of previously certified California vehicles." Pet. App. 23a. Several simple examples illustrate why this approach is not permissible under Section 177.

A State could decide on a different selective adoption of California's standards, choosing the CARB emission regulations but not the requirement of progressively lower fleet averages, and defend its decision on the same basis as the District — that it had adopted California standards.

Of course, the effect of such a rule would be quite different from the rules promulgated by CARB. Without the pressure of having to meet increasingly stringent emission levels, manufacturers would have no reason to produce and sell the cleaner vehicles. They could focus all of their efforts on vehicles

satisfying the least restrictive emission standards. That would have substantially different — and adverse — consequences for pollution levels.

On the other hand, a State could choose to adopt only the most restrictive of the CARB emission standards. Eliminating the gradual phase-in period provided by the CARB standards could create a situation in which manufacturers might not have sufficient production to meet demand for vehicles in that State.

Not surprisingly, the lower courts that have considered this question — other than the courts below — have concluded that any deviation from the exact rules adopted by California makes Section 177 inapplicable. See *Ass'n of Int'l Auto. Mfrs.*, 208 F.3d at 7-8 (ZEV sales mandates not identical to California standards are preempted); *American Auto. Mfrs. Ass'n*, 152 F.3d at 199-201 (same).

Under Section 177, a State may adopt standards that differ from the federal standards only if they "are *identical* to the California standards." 42 U.S.C. § 7507 (emphasis added). Here, of course, the Fleet Rules are not identical to the California standards. As noted above, their very purpose is to be more restrictive. Moreover, Section 177 expressly prohibits a State that adopts the California standards from limiting — whether directly or indirectly — the "sale of a new motor vehicle * * * that is certified in California as meeting California standards." *Ibid.* But that is precisely the function of the Fleet Rules, which limit the sale of various vehicles (including diesel-fueled vehicles) that do meet the California standards.

C. Section 246.

As discussed above (at pages 31-33), Section 246 does not generally authorize States to adopt purchasing restrictions; rather, it preserves against Section 209(a) preemption any fleet purchasing requirements that satisfy the procedural and

substantive standards set forth in Section 246. Because the Fleet Rules do not comply with these standards, they are preempted.

The Fleet Rules were not submitted to EPA for approval as part of California's state implementation plan revision, as required by Section 246. Indeed, California did not submit *any* fleet purchasing program in its implementation plan revision. California instead exercised its option under Section 182(c)(4)(B) of the Act, 42 U.S.C. § 7511a(c)(4)(B), to submit its LEV Program as a substitute in place of a Section 246 fleet purchasing program, and EPA approved the substitution finding that the LEV Program would achieve substantially greater emission reductions. See 64 Fed. Reg. 46,849, 46,851 (1999) (Table 1) (forecasting LEV program emission benefits in excess of those that would be achieved by the federal clean-fuel fleet program). Because the Fleet Rules were not even submitted to (let alone approved by) EPA, respondents cannot rely on Section 246.

Moreover, the Fleet Rules could not otherwise be authorized by Section 246 because the terms of the Fleet Rules are squarely inconsistent with the plain language of Section 246(d), which states that a plan revision establishing a fleet purchase program "shall provide that the choice of clean-fuel vehicles and clean alternative fuels shall be made by the covered fleet operator * * *." The Act defines "clean-fuel vehicle" as a vehicle that "has been certified to meet * * * the clean-fuel vehicle standards" applicable under the statute. 42 U.S.C. § 7581(7). Thus, federal law requires Section 246 fleet purchasing programs to preserve the fleet operator's freedom to choose from among all of the low-emission and diesel-fueled vehicles permitted to be sold. The Fleet Rules, however, do not allow a fleet operator to choose to purchase vehicles from among all of the low-emission vehicles permitted to be sold under California law. Rather the Fleet Rules prohibit operators from purchasing certain low-emission (and all diesel-fueled) vehicles that

comply with the applicable emission regulations and that are offered for sale in California.

In sum, the Fleet Rules fail to comply with numerous requirements of Section 246 and accordingly are not protected against preemption under Section 209(a).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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